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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM B. COLLINS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,
Petitioner and Appellee below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellant below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is an action at law brought in the District Court of the United States for the Eastern District of Wisconsin by the Petitioner herein against the United States of Amer-

1s

ica, respondent herein, to recover the amount of a World War Veteran's Convertible Term Insurance Policy (R. 14). The policy was reinstated as of July 1st, 1927, and all premiums paid thereon down to the time of insured's death on September 21, 1934 (R. 14). The defense was that the insured secured such reinstatement by fraud (R. 10). The trial was by jury and a verdict and judgment was rendered in favor of the plaintiff and against the defendant, the United States of America (R. 225, 226).

A motion of the defendant for directed verdict was denied by the trial court (R. 224, 157). A motion for judgment by defendant notwithstanding the verdict and in the alternative for a new trial was filed by defendant on April 26th, 1940, and within 10 days after the verdict was returned (R. 215, 217). These motions were denied (R. 224). An appeal was taken from the judgment by defendant to the Circuit Court of Appeals for the Seventh Circuit (R. 227). Before the hearing in the Circuit Court, petitioner, on Febfuary 15th, 1941, moved to dismiss defendant's appeal or affirm the judgment of the District Court with penalty for delay on the grounds hereinafter set forth (R. 240), This motion was denied (R. 245, 246-247).

The principal questions involved on said appeal were:

(a) Whether the issue of alleged fraud in said reinstatement on the record in the case was a question of fact for the jury or a question of law for the Court; whether defendant's motion for directed verdict should have been granted (R. 215, 217).

(b) Whether the Circuit Court should grant the motion of the petitioner to dismiss defendant's appeal or affirm the judgment of the District Court on the grounds that no substantial question was raised for consideration on appeal and because of defendant's failure to comply with the mandatory provisions of Rule 9, of the Rules of the Circuit

Court of Appeals for the Seventh Circuit, no statement of points having been filed (R. 228-229, 239).

(c) The further question now involved is whether a Circuit Court of Appeals can substitute its discretion for that of the District Court under Rule 50b, Federal Rules of Civil Procedure following 28 U. S. C., section 723c, which discretion was exercised on said defendant's motion for directed verdict, without violating the letter and the spirit of the Seventh Amendment to the Constitution of the United States, no abuse of such discretion by the District Court appearing, Plaintiff duly petitioned for a re-hearing in the Circuit Court of Appeals and said petition was dismissed on August 4th, 1941 (R. 254).

II.

Jurisdiction of Supreme Court to Review on Writ of Certiorari.

1. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240, Judicial Code, 28 U. S. C. A. #347a), which provides that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States, upon petition to grant certiorari to bring up the record for review with the same power and authority and with like effect as if the cause had been brought there on unrestricted appeal.

2. The judgment appealed from was entered on the 28th day of May, 1940 as appears from pages 225, 226, 227 of record, the printed record herein.

3. The petition herein seeks a review of a judgment and decision of the Circuit Court of Appeals in a civil action at law to recover the principal amount of a World War Veteran's policy, to review the determination that the issue

presented by defendant's affirmative defense of fraud in securing a reinstatement of said policy, was on the record in this case one of law for the court and not one of fact to be settled by the jury as appears from pages 246-253 of the printed record herein.

4. Jurisdiction of this Court for the Writ is invoked on the following grounds:

a. Under Rule 50, subdivision b, Federal Rules of Civil Procedure, 28 U. S. C. A., following 723c, the District Court is vested with discretion under certain conditions to enter judgment contrary to the jury's verdict without granting a new trial. (Appendix) Can a Circuit Court of Appeals overturn the discretion of the District Court vested in said Court by law, under Rule 50b on a motion for directed verdict, review the facts, weigh the evidence, judge the credibility of witnesses and substitute its discretion for that of the District Court, and order said Court to grant a motion for directed verdict, when the record shows no abuse of such discretion by the District Court, when the very decision itself of said Circuit Court of Appeals actually admits that there was no abuse of such discretion? At pages 250-251 of its decision the Circuit Court states: "*A very close question is presented as to whether the record shows any question for the jury* or whether misrepresentation was proved as a matter of law, entitling the government to a directed verdict in its favor." (Italics ours.)

Has the adoption of Rule 50b enlarged the powers of the Circuit Courts to review the facts? We respectfully invoke the jurisdiction of the Supreme Court for the issuance of a writ of certiorari in order to secure an authoritative construction of said Rule 50b to serve as a guide to future litigants on an important question of constitutional rights and judicial procedure involving the construction of

the Seventh Amendment to the United States Constitution guaranteeing jury trials, which has not been but should be decided by this Court and to secure uniformity of decision and to avoid and resolve conflicts in the various circuits.

b. Certiorari should be granted to resolve a conflict of decisions below and the conflict of decisions with those of other circuits on the same matter. The District Court denied defendant's motion for a directed verdict (R. 224-157) and its later motion for judgment *non obstante veredicto* (R. 215-217-224). The District Court and the circuit court reached different conclusions on the question of a directed verdict on the same record; and elsewhere, in other circuits there is diversity of opinion on the same matter. Judge Kerner, Circuit Judge, dissenting, stated that on the record the issue was a jury question (R. 253). In the public interest the writ should issue an order to secure uniformity of decisions on a question of general importance and peculiar gravity affecting as it does a large class of policy holders.

c. Rule 9, subsection 1, of the Rules of the Circuit Court of Appeals for the Seventh Circuit provides: "Where an appeal is taken to this Court, the appellant shall file with the clerk of the district court, for inclusion in the record on appeal, a statement of points which shall set out separately and particularly each error asserted and intended to be urged. *No appeal shall be considered, unless such statement of points shall have been so filed.*" (Italics ours) No such statement of points was so filed with the clerk of the District Court (R. 228, 229), as shown by defendant's "Designation of Contents of Record on Appeal". No such statement was filed on February 15th, 1941, long after the appeal was docketed in the Circuit Court of Appeals on or before November 24th, 1940 (R. 227, 228). On February 15th, 1941, plaintiff moved to dismiss defendant's appeal to the Circuit Court of Appeals because no substantial

question was raised for consideration on appeal and because defendant failed to comply with the provisions of said Rule 9 (R. 239). This motion was denied without prejudice to renew it on February 26th, 1941 (R. 245) and was later denied upon its renewal (R. 247).

Did this mandatory rule bind the Circuit Court adopting it as well as the appellant, or could the Circuit Court which adopted the rule waive its mandatory provisions in favor of appellant and consider the case, the record showing a clear violation of such rule by the defendant?

We invoke the jurisdiction of this Court for the writ because the Circuit Court's decision on this motion so far departs from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision and for a construction of the binding force of rules so adopted on the Court adopting them.

III.

Reasons Relied On for the Allowance of the Writ.

1. The decision of said Circuit Court of Appeals as to the holding that the District Court erred in not granting defendant's motion for a directed verdict at the close of the trial is a decision of an important federal question involving the interpretation of the Seventh Amendment to the United States constitution and also involving the construction of Rule 50b Federal Rules of Civil Procedure in its relation to said Seventh Amendment, which has not been but should be settled by this Court.

2. The decision and judgment of said Circuit Court of Appeals reversing the judgment of the District Court because the latter court refused to grant defendant respondent's motion for a directed verdict at the close of the trial is in conflict with the decisions of the Circuit Court of Ap-

peals for the Fifth Circuit, on the same matter, in the cases of:

Bailey v. *United States*, 92 F. (2d) 456, 458;
United States v. *Thomas*, 92 F. (2d) 929, 930;
United States v. *Barton*, 117 F. (2d) 540, 541;
United States v. *Dickson*, 92 F. (2d) 459;
United States v. *Robins*, 117 F. (2d) 145.

It is also in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit on the same matter in the case of:

Drew v. *United States*, 104 F. (2d) 939, 942;

and in conflict with the decisions of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the cases of:

Jones v. *United States*, 112 F. (2d) 282, 286;
United States v. *Dupire*, 101 F. (2d) 945, 948;
Asher v. *United States*, 63 F. (2d) 20, 23;

and in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit on the same matter in the cases of:

United States v. *Hartle*, 99 F. (2d) 923, 925;
United States v. *Smith*, 117 F. (2d) 911, 912;
United States v. *Fulkerson*, 67 F. (2d) 288, 290.

3. The decision of the Circuit Court of Appeals as to denial of petitioner's motion to dismiss defendant's appeal or to affirm the judgment of the District Court because of said defendant's failure to comply with Rule 9 of said Court so far departs from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision (R. 246-247).

IV.

The Cases Believed to Sustain Said Jurisdiction Are As Follows:

Berry v. *United States*, 311 U. S. —, 61 S. Ct. 637, 638;
Baltimore v. *Carolina Line, Inc.*, 295 U. S. 654, 659;
Gunning v. *Cooley*, 281 U. S. 90, 94;
Slocum v. *New York Life Ins. Co.*, 228 U. S. 364, 398;
Richmond & Danville R. R. Co. v. *Powers*, 145 U. S. 43, 45;
Stroehmann v. *Mutual Life Ins. Co.*, 300 U. S. 435, 440;
Aschenbrenner v. *U. S. F. & G. Co.*, 292 U. S. 80, 82;
Magnum Co. v. *Coty*, 262 U. S. 159, 163.

WHEREFORE your petitioner prays that a writ of certiorari issue, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 7516, Harriet V. Pence, Plaintiff-Appellee, *v.* The United States of America, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, September 26th, 1941.

HARRIET V. PENCE,
By WILLIAM B. COLLINS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,
Petitioner and Appellee Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellant Below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Opinions of Courts Below.

The opinions in the District Court are set forth at pages 219 and 223 of the record but are not reported. The opinion of the Circuit Court of Appeals is set forth at pages 246 to 253 of the record and has been reported in 121 F. (2d) pages 804 to 809.

II.

Jurisdiction.

This has already been stated in the preceding petition under II (pp. 3 to 6) which is hereby adopted and made a part of this brief.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1 to 3) which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the District Court's ruling on defendant's motion for directed verdict.

2. The Circuit Court of Appeals erred in assuming that it had the power to disturb the discretion of the District Court exercised on defendant-respondent's motion for directed verdict, in the absence of an abuse of such discretion by said District Court.

3. The Circuit Court of Appeals erred in not granting petitioner's motion in said Court to dismiss defendant-respondent's appeal, because that Court never acquired jurisdiction, no statement of points having been filed in compliance with Rule 9 of said Court.

V.

ARGUMENT.

Summary of the Argument.

Point A. The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury.

Point B. The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50b and the common law in the District Court and has violated the Seventh

Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

Point C. Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that Court never acquired jurisdiction.

POINT A.

The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury:

Lawrence Waldo Pence, while serving as a doctor in the United States Medical Service at the National Home at Wood, Wisconsin, on June 21st, 1927, applied for reinstatement of a Ten Thousand Dollar ($10,000) World War Veterans' Policy (R. 169-171; Plaintiff's Exhibit 3). It had lapsed for non-payment of premiums on March 2nd, 1920 (R. 14). He was examined for re-instatement by a Government doctor, Joseph H. Plant, on June 25th, 1927, and recommended for re-instatement as a "1st Class Risk" (R. 173; Plaintiff's Exhibit 3, Question 21). The policy was re-instated as of July 1st, 1927, and all premiums paid to and including August, 1934 (R. 14). He died on September 21st, 1934 within the 31 day grace period of the policy (R. 14, 15). After disagreement, his widow and beneficiary sued the Government on the policy and the Government set up the affirmative defense of fraud in securing said re-instatement (R. 10).

The Government contends that Pence answered falsely certain questions in the application for re-instatement. These questions made inquiry as to whether he had had certain diseases (R. 171; Plaintiff's Exhibit 3, Question 11) and whether he had during the lapse of the policy consulted any doctors for illness (R. 169, Plaintiff's Exhibit 3, Question 7). He gave negative answers to both of these ques-

tions and the Government now contends that these answers were false (R. 10).

Beginning over a year after re-instatement of the policy on July 1st, 1927, Pence made other application to the Government of the United States for retirement, for compensation and vocational training and for pension in which he made statements in conflict with his answers in his application for re-instatement of his insurance (Defendant's Exhibit "J"; R. 98, 208) (Defendant's Exhibit "D"; R. 99, 197, 198) (Defendant's Exhibit "H"; R. 206, 207) (Defendant's Exhibit "F"; R. 201, 202) (Defendant's Exhibit "G"; R. 102, 203, 206) (Defendant's Exhibit "M"; R. 101, 211) (Defendant's Exhibit "K"; R. 209, 210) (Defendant's Exhibit "I"; R. 214) (Defendant's Exhibit "E"; R. 99, 100, 199, 200) (Defendant's Exhibit "L"; R. 100, 101, 210, 211). These Exhibits form the principal basis for defendant's defense of alleged fraud in securing the re-instatement.

The Government when acting upon these various claims of Pence had him examined by their doctors on several occasions and their medical reports up to November 12th, 1930, deny the existence of the ailments claimed by Pence. The first of these medical reports is Plaintiff's Exhibit 10, which shows the result of an examination of Pence on October 10th, 1928 (R. 184, 185). Other medical reports showing that Pence did not have the ailments he claimed in applications after re-instatement resulted from these examinations by Government doctors and are in evidence as Plaintiff's Exhibits as follows: (Plaintiff's Exhibit 13; R. 184, 185) (Plaintiff's Exhibit 14; R. 187, 188) (Plaintiff's Exhibit 15; R. 189, 190) (Plaintiff's Exhibit 18; R. 191, 192) (Plaintiff's Exhibit 9; R. 184) (Plaintiff's Exhibit 3; R. 172, Q. 7, R. 173, Q. 21) (Plaintiff's Exhibit 8; R. 182, 183).

The principal ailments claimed by Pence in his earlier examinations were acute sinusitis and myocarditis. When medical reports negatived these claims he added other ailments in subsequent applications. But in each of these applications, Question 9 asked applicant to state all his ailments and at the end of each application and just above the signature of Lawrence W. Pence is the following: "My answers to Question 9 have been read to me and I hereby certify that the complaints herein recorded are all that I am suffering from to my knowledge" (R. 185, 186, 188, 190, 191).

In his first application upon which the medical report, dated October 10th, 1928, was made (Plaintiff's Exhibit 10; R. 184, 185) Pence claimed as follows: "9. Present complaint (subjective symptoms, not diagnosis): Sinusitis, Heart trouble, Shortness of breath on exertion, No precordial pain. No oedema", and at the end over his signature he certifies that that constituted all his complaints. But later on in his subsequent applications, Pence brings in appendicitis, duodenal ulcer, gastroptosis and constipation. In his application for compensation and vocational training dated August 27th, 1928, the first application after the re-instatement of the policy (Defendant's Exhibit "D"; R. 197, 199) under the heading "D, Medical survey", we find "he states he was never treated by any doctor since discharged from the army, had not been confined to bed or in hospital since his discharge" (R. 198). He later made conflicting statements after his applications were turned down and added new ailments. Defendant introduced a letter from Pence written by him on December 8th, 1933, after his applications had been made and apparently acted upon, in which Pence states that the Board of Appeals ridiculed and belittled his claims (Defendant's Exhibit "M"; R. 212, 213).

In Plaintiff's Exhibit 10, the medical report of Government doctors, dated October 10th, 1928, is the following: "X-ray shows all sinuses clear" and, "Heart: Diagnosis; Lessened Myocardial tone and reserve, Myocardial Degeneration beginning" (R. 185). But in Plaintiff's Exhibit 13, a medical report dated June 3rd, 1929, by Drs. Edward R. Ryan and Henry J. Kuhn, we find the following report on Pence's heart by the same doctor, Henry J. Kuhn who made the report of October 10th, 1928 shown in Plaintiff's Exhibit 10 (R. 184). Dr. Henry J. Kuhn states on June 3rd, 1929, in plaintiff's Exhibit 13 (R. 185, 186), as follows: "Examination: There is no objective evidence of respiratory or circulatory distress, heart not enlarged, not displaced, action regular, apex beat is not unusually forceful or heaving. Myocardial tone is fairly good. Sounds fairly well sustained. No unusual accentuations. Exercise fifty hops elicits no dyspnea of cyanosis. Tone continues good. No murmur, no thrill. Rate at rest is 80, after exercise 96, after two minutes 80. Blood pressure 130/90. Diagnosis: No definite cardiovascular disease noted" (R. 185, 186).

Dr. Edward R. Ryan made no report on sinusitis on June 3rd, 1929, although Pence claimed it in his application, though Dr. Ryan did report on other matter as an eye, ear, nose and throat specialist (R. 186, Plaintiff's Exhibit 13).

Other medical reports after June 3rd, 1929, varied somewhat but as late as February 27th, 1933, in a medical report by Government doctors at Hines, Illinois, Pence's sinuses were found normal.

"Sinuses: The roentgenological examination of the nasal accesory sinuses shows all sinuses to be clear and well aerated. There is no demonstrable X-ray evidence of pathology. Summary: Sinuses—normal" (Plaintiff's Exhibit 18, R. 196).

At the Government hospital at Hines, Illinois on February 27th, 1933, Dr. Edward W. Hollingsworth's clinical interpretations from an electrocardiogram of Pence's heart was as follows: "Suggested Myocardial Degeneration" (R. 193, Plaintiff's Exhibit 13). On cross-examination, Dr. Hollingsworth testified regarding this clinical interpretation as follows: "A.—I would be quite suspicious. I would not be sure" (R. 132). But on the same date, Dr. D. S. Levy, another Government doctor at Hines reported on Pence's heart as follows: "Pulses are equal, small, regular and synchronous with the heart beat. Radial arteries are soft and compressible. No murmurs. Heart tones normal. Pulse (recumbent)—88 B. P. 160/98. Pulse (erect) 88 B.P. 142/90. Pulse (after exercise) 100 Slight dizziness. No cyanosis or vertigo. BP. 156/96. Pulse (2" after exercise) 92 B.P. 160/98" (R. 191, Plaintiff's Exhibit 18).

This report of examination dated February 27th, 1933, was nearly six years after re-instatement and even then Government doctors were not sure about the condition of Pence's heart. One doctor suspected myocarditis; another apparently found the heart normal. In the case of *Lumbra v. United States*, 290 U. S. 551, 560 in referring to evidence of health subsequent to the lapse of a policy in an action for total and permanent disability this Court stated that evidence subsequent to the lapse of a policy will "be considered only for the purpose of determining his condition while the policy was in force." The evidence of these various medical examinations of Pence by the Government after re-instatement on July 1st, 1927, were introduced for the purpose of showing what Pence's health was at the time of his application for re-instatement on June 21st, 1927. Even if the medical reports subsequent to that time had shown some disease or ailment, that would not be proof of the fraud the defendant alleges and seeks to sustain. These statements of Pence in applications subsequent to re-in-

statement could not, under any circumstances be held to be conclusive evidence of fraud in the re-instatement as held by the Circuit Court of Appeals. All of the medical testimony in the quoted medigal reports from Government doctors themselves negatives the existence of the ailments Pence claimed. These medical reports directly contradicted Pence's claims in applications subsequent to re-instatement. Government doctors found these claims false but the Government now takes the position that Pence's false claims in applications subsequent to re-instatement are true; that it therefore follows conclusively that Pence's answers to questions in the application for re-instatement were false and sustain their charges of fraud. Based on these conflicting statements alone it would seem the issue was a jury question.

But there were several medical examinations made by Government doctors prior to Pence's application of June 21st, 1927, for re-instatement that do show his condition at the time when such application was made. Petitioner showed that in the year 1924, Pence applied for a position with the medical service of the Government. (Plaintiff's Exhibit 8; R. 176, 182) On said application Pence was given two examinations by Government doctors—one by Royal F. French, on November 29th, 1924, and one by Dr. A. R. Pierce, on March 13th, 1925. (R. 182, 183) He was found physically fit and these two doctors found no disease of the heart or sinuses. In the medical report of Dr. Royal F. French on November 29, 1924, we find the following: "Examiner should consider and report on: sight, hearing,—heart disease—" "Describe fully any deviations from the normal, with their effect on function, if present: valvular heart diseases; is it fully compensated? *None*" (italics ours) (Plaintiff's Exhibit 8; R. 182)

Pence re-entered the medical service of the United States on March 1st, 1925, and worked steadily for the Government

until he died on September 21st, 1934. (R. 68, 70) He had a record of regular work during the entire period, being absent a day or two now and then with colds but not otherwise. (R. 27, 30, 33)

A Government doctor, Dr. Joseph H. Plant, examined Pence on his application for re-instatement of his policy on June 25th, 1927, and recommended Pence as a "1st Class Risk". (R. 173, Question 21; Plaintiff's Exhibit 3) In the "Medical Examiner's Report" filled out by Dr. Plant, question 7 is answered as follows: "7. After examination do you find any abnormality of the heart? No. Is it irregular? No. Does it intermit? No. Is there a murmur? No. (if any heart disability is found or suspected, complete special heart examination on reverse side)" (Plaintiff's Exhibit 3; R. 172) Dr. Plant was not produced as a witness at the trial.

In the examination of Pence by Dr. A. R. Pierce, on March 13th, 1925, the heart was negative as shown by answer to question 7; and question 15 with its answer which was as follows: "15. Give here a supplemental and complete description of every abnormality, disease, or physical defect, past or present: *None.*" (Plaintiff's Exhibit 8; R. 183)

Pence was found to be in good health at the time of his honorable discharge from the military service on January 9th, 1919, claiming no disease or ailment and the Government finding none. (Plaintiff's Exhibit 9; R. 184) From the time he left the army on January 9th, 1919, down to the time of his death on September 21st, 1934, in addition to his regular duties as a physician, he worked large gardens, played ball, running the bases, played golf and horseshoe, hunted and fished, mowed his own lawn, rowed rapids and loved the outdoors. He was more active physically than men of his age and profession. (R. 29, 50, 56, 57)

All members of his family testified that he was never sick. (R. 34, 41, 44, 48, 49) He worked the day before he

died and was found dead in the morning (R. 33). No one knows what he died of as there was no attending physician (R. 78, 79) and there was no autopsy (R. 80). The statements which Pence made in his various applications subsequent to reinstatement, while evidence, are not conclusive proof, as held by the Circuit Court, that the statements made in his application for reinstatement were false. In the light of the other evidence in this case the statements made in application subsequent to reinstatement are false. They do not establish fraud in the reinstatement. That was a question to be settled by a verdict of the jury, the evidence being in conflict. At best for the defendant, it was on this record a question for the jury.

At page 6 (R. 251) of its decision, the court states that Pence had myocarditis for which he was treated by a camp physician who prescribed medication and rest and that therefore he gave false answers to the inquiry made in the eleventh question concerning diseases (R. 171). The court probably based its view on Pence's statement in an application subsequent to reinstatement. The camp doctor was not produced. Neither were any hospital records for the camp, although defendant's counsel was served with notice to produce all hospital records and medical reports (R. 113). The statement is in direct conflict with other statements made by Pence (R. 198).

In his application for vocational training dated August 27th, 1928, Pence names no doctors as having treated him (Question 18) and states he had not been confined to bed or in hospital since discharge (R. 198, Question 19). A few months after the alleged treatment at camp Pence was honorably discharged on January 9th, 1919 (R. 14) and claimed no disability at the time of discharge and was found by Government doctors to be in good health then (Plaintiff's Exhibit 9; R. 184). It is not likely that Pence thought

at the time that there was anything the matter with his heart, or he would have so claimed at the time of his discharge. Being a doctor himself the exercise he took from the time he was discharged on January 9th, 1919, until his death on September 21st, 1934, completely negatives the assumption that Pence ever had anything the matter with his heart or that he ever believed that he had.

But the court, at page 7 (R. 252) of its decision, states that this was a material misrepresentation and that it was one of the causes of his death seven years after reinstatement of the policy. No medical report by Government doctors found heart disease. Virtually all are to the contrary. Nor is it accurate to state that myocarditis or any heart trouble caused his death. There was no attending physician and Pence worked the day before he died (R. 33, 78, 79). There was no autopsy and no one knows the cause of death (R. 80). The death certificate, signed by a physician who never treated Pence, is of no evidentiary value. There may be many causes of sudden death.

Can Pence's statement that he had been treated at camp late in the year 1918 for myocarditis support a finding of fraud by Pence and determine conclusively as a fact that Pence had myocarditis? Why was Pence honorably discharged from the army on January 9th, 1919, a few months later without claiming any disease or disability and without Government doctors finding it? If true, why was it not found in any of the subsequent examinations of Pence's heart in 1924, in 1925 or in 1927 when the policy was reinstated or in 1929 or 1933? We submit that fraud cannot be grounded on such statement in view of all the evidence in this record.

The circuit court finds at page 6 (R. 251) of its decision that Pence's negative answer to the seventh question was

false (R. 169) and that Pence consulted a physician. Said question and answer are as follows:

> "Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since the lapse of this insurance? (Answer 'Yes' or 'No'). *No.* If so give dates and full particulars, including the name and address of physician ....." (R. 169).

In 1925 Pence was working in a government hospital at Sioux Falls, South Dakota. His mother died of cancer in the west (R. 38). He was not sick, but being around with doctors every day and being a doctor himself, his mother's death naturally worried him and he had a check-up to relieve his mind. He was not consulting any physician because of any illness or disability. That would seem to be what the question sought to find out and we submit that fraud can not be predicated on this fact in the absence of a showing of an intentional misrepresentation, if any such there was.

Reading the whole question, we believe that its object and purpose, as understood by Pence, was to find out whether the applicant for reinstatement had gone to a doctor because of any illness or pain and consulted him with reference thereto for the purpose of obtaining medical treatment or relief. It was for the jury, however, and not for the court to say whether Pence was guilty of intentional misrepresentation in answering this question as well as to decide which statements were true and which were false, which were innocently and which were fraudulently made.

(5th Cir.) *Bailey* v. *United States*, 92 F. (2d) 456, 458;
(6th Cir.) *Drew* v. *United States*, 104 F. (2d) 936, 942;
(8th Cir.) *Jones* v. *United States*, 112 F. (2d) 282, 286.

We respectfully submit that on the evidence in this record no fraud was proved and at best for defendant, the issue involved was a question of fact for the jury.

POINT B.

The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

On the very face of its decision the Circuit Court of Appeals has violated the Seventh Amendment to the Constitution and the spirit and letter of subdivision (b) of Rule 50, Federal Rules of Civil Procedure. This rule merely restates as a rule of procedure in District Courts under certain conditions a practice which had existed under the common law. *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 659). The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law where the amount in controversy shall exceed Twenty dollars the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.*" (Italics ours.)

The Circuit Court in its decision holds:

> "*A very close question is presented as to whether the record shows any question for the jury*, or whether misrepresentation was proved as a matter of law, entitling the Government to a directed verdict in its favor" (R. 250-251). (Italics ours.)

If it was a very close question as stated by that court and as supported by the record, it was not a question of law for the court but a question of fact to be settled by

the verdict of a jury. For the Circuit Court under these circumstances to overturn the discretion of the District Court, proceed to weigh the evidence, judge the credibility of witnesses, decide which statements of Pence were true and which were false, ignore the medical reports of Government doctors introduced by the plaintiff, ignore his steady habits of work for the Government from March 1st, 1925 until he died on September 21st, 1934, his habits of life including a great variety of outdoor exercise, the statements of his family and others that he never was sick, never complained about his health, was clearly to usurp the constitutional function of the jury to try and decide facts and to violate the Seventh Amendment to the Constitution. If it was a close question it should have been resolved against the Government because it had the burden of proof on its affirmative defense of fraud. If it was a close question then the discretion of the District Court acting under Rule 50b should not have been disturbed. The power to decide in first instance whether there was any substantial evidence to support the jury's verdict was vested by law and expressly by Rule 50b in the District Court which had the advantage of hearing the witnesses and better judging the weight and the credibility of their testimony. The Circuit Court could not disturb the discretion of the District Court on the question of a motion for directed verdict unless there was an abuse of that discretion—unless the District Court committed error as a matter of law; unless there was no substantial evidence upon which to support the verdict of the jury. And in considering defendant's motion for directed verdict, all undisputed facts, proved by petitioner and all reasonable inferences, deductions and conclusions to be drawn therefrom which are favorable to the beneficiary of the policy are to be regarded as true.

Stroehmann v. *Mutual Life Ins. Co.*, 300 U. S. 435, 440;
Lumbra v. *United States*, 290 U. S. 550, 553;

Gunning v. *Cooley*, 281 U. S. 90, 94;
Richmond & Danville R. R. v. *Powers*, 149 U. S. 43, 45.

Where uncertainty as to the existence of fraud arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law for the court but one of fact to be settled by a jury. Kerner, Circuit Judge, dissenting, stated that on the record the issue was a jury question (R. 253). On the record in the two courts thus far, we have on this question of directed verdict, two district judges with opposite views and two circuit judges with opposite views. There was a conflict in the evidence on the trial making the issue a jury question, as evidenced and emphasized by the fact that fair-minded men, two district judges and two circuit judges honestly drew different conclusions on the question of directed verdict.

Petitioner had a verdict of a jury and the judgment of the trial court. That verdict could not under the Seventh Amendment to the Constitution of the United States and according to the practice of common law embodied in Rule 50b be otherwise re-examined in any court of the United States than according to the rules of the common law. The safeguards and inhibitions of the Seventh Amendment were cast aside, the verdict was not re-examined according to the rules of common law, the substantial evidence in the record supporting the verdict was ignored of explained away, the Circuit Court substituted its discretion for that of the District Court, usurped the function of the jury; and thus deprived petitioner of her constitutional right to a jury trial. Referring to Rule 50b this Court very recently held that the rule had not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being a constitutional tribunal provided for trying facts in courts of law.

Berry v. *United States*, 311 U. S. —, 61 S. Ct. 637, 638.

Some years ago this Court held that it may be if we were to usurp the functions of the jury and determine the weight to be given to the evidence we might arrive at a different conclusion.

Aetna Life Ins. Co. v. *Ward*, 140 U. S. 76, 91.

That is just what, in our opinion, the Circuit Court of Appeals has done in this case.

We respectfully submit that the Circuit Court of Appeals erred in disturbing the discretion of the District Court on the question of directed verdict.

Point C.

Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that court never acquired jurisdiction.

(a) Petitioner's brief on motion in the Circuit Court of Appeals showed that the issue presented was a jury question and that defendant had raised no substantial issue for consideration on appeal (Point A this brief, pp. 11 to 21).

(b) Petitioner's motion to dismiss defendant's appeal should have been granted because of defendant's failure to comply with subdivision 1, Rule 9, of the Rules of the Circuit Court of Appeals for the Seventh Circuit. Said rule is as follows:

> "1. Where an appeal is taken to this court, the appellant shall file with the Clerk of the District Court, for inclusion in the record on appeal, a statement of points which shall set out separately and particularly each error asserted and intended to be urged. *No appeal shall be considered, unless such statement of points shall have been so filed.*" (Italics ours.)

No such statement of points was *so filed* with the Clerk of the District Court as shown by defendant's "Designation

of Contents of Record on Appeal" (R. 228, 229). No such statement of points was filed on February 15th, 1941, long after the appeal was docketed in the Circuit Court of Appeals on or before November 24th, 1940 (R. 227-228). On February 15th, 1941, petitioner moved to dismiss defendant's appeal to the Circuit Court of Appeals because no substantial question was raised for consideration on appeal and because defendant failed to comply with the provisions of said Rule 9 (R. 239). This motion was on February 26th, 1941, denied without prejudice to renew it (R. 245) and was later denied upon its renewal (R. 246-247). This rule was made mandatory by its provisions. It had the force and effect of law. The Circuit Court of Appeals could not consider this case because of defendant's failure to comply with the rule and this appeal was never properly before the Circuit Court of Appeals for its consideration.

Rule 9 of the Circuit Court of Appeals for the Seventh Circuit became effective November 10th, 1939. The power to make the rule was conferred upon the court by law, Judicial Code, section 122 (28 U. S. C. A. section 219). It is as follows:

> "Each circuit court of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have the power to establish all rules and regulations for the conduct of the business of the Court within its jurisdiction as conferred by law.
>
> March 3, 1891, C517, #2, 26 Stat. 826;
> March 3, 1911, C231, #122, 36 Stat. 1132."

A rule of the court thus authorized and made has the force of law and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. But the rule once made without any qualification must be applied to all cases

which come within it, until it is repealed by the authority which made it.

Rio Grande Irrigation Co. v. *Gildersleeve,* 174 U. S. 603, 608;

Thompson v. *Hatch,* 3 Pick. 512;

Weil v. *Neary,* 278 U. S. 160, 168, 169.

While, of course, the rules of court bind the judges of the court as much as its litigants.

Clawans v. *Whitford, et al.,* 55 F. (2d) 1037, 1038. Certiorari denied in this case 287 U. S. 605.

Not having been *so filed* before the record was sent up on appeal, a statement of points could not thereafter be filed in compliance with the rule and the appeal never properly came before the Circuit Court of Appeals. The Circuit Court of Appeals in its decision of July 2nd, 1941, denied plaintiff's motion to dismiss and cites the case of *Adams, et al.* v. *N. Y. Chicago & St. Louis R. R. Co.* decided by it on May 20th and June 24th, 1941 (121 F. (2d) 808, 809) but the decision shows that the cited case related to Rule 75(d), Federal Rules of Civil Procedure. Even the Circuit Court of Appeals for the Seventh Circuit seems to sustain our position in an earlier case in discussing Rule 9. (R. 246-247) Appendix.

Keeley v. *Mutual Life Ins. Co.,* 113 F. (2d) 633, 636.

We are at a loss to understand how a decision involving the construction of Rule 75d, Federal Rules of Civil Procedure can serve as any precedent for the construction of Rule 9 of the Circuit Court of Appeals. We do know, however, that there is no such language used in Rule 75d as we find at the end of subdivision 1, Rule 9, Circuit Court of Appeals.

We respectfully submit that because of defendant's failure to comply with the provisions of subdivision 1, Rule 9,

Circuit Court of Appeals for the Seventh Circuit, defendant's appeal never properly reached said Court and that our motion to dismiss should have been granted.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

WILLIAM B. COLLINS,
Counsel for Petitioner.

APPENDIX.

Federal Rules of Civil Procedure.

Rule 50(b) RESERVATION OF DECISION ON MOTION:

"Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of the verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Rule 75(d) STATEMENT OF POINTS:

"If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."